

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF PASCO, A MUNICIPAL
CORPORATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 80-99

ORDER REMANDING DOCKET
No. DE 80-255 TO THE
DEPARTMENT OF ECOLOGY AND
DENYING APPELLANT'S
MOTION TO DISMISS

(FINAL ORDER)

This matter came before the Pollution Control Hearings Board, Nat Washington, chairman, and David Akana (presiding) on February 3, 1981 in Lacey, Washington.

Appellant was represented by Dennis J. DeFelice, City Attorney; respondent was represented by Charles Douthwaite, Assistant Attorney General. Court reporter Betty Koharski recorded the proceedings.

This matter brings for resolution a Motion to Dismiss on several

1 grounds brought by appellant. If the motion was granted, respondent's
2 Order DE 80-255 would be vacated; if the motion was denied, Order DE
3 80-255 would be remanded to respondent, as agreed by the parties, to
4 establish different construction dates. Appellant's motion to
5 reconsider prehearing order was denied at hearing.

6 Having considered the amended notice of appeal, the memorandum in
7 support of respondent's motion for summary judgment, appellant's
8 memorandum in opposition thereto and in support of appellant's motion
9 to dismiss, respondent's reply to memorandum, appellant's second
10 memorandum in support of motion to dismiss, respondent's reply to
11 second memorandum, the affidavits filed, appellant's motion to
12 dismiss, the file and record herein, and argument of counsel, the
13 Board concludes that the motion to dismiss should be denied.

14 1. Insufficiency of process. The Board has jurisdiction over the
15 matter relating to the appeal of Docket No. DE 80-255. Appellant's
16 reliance on RCW 4.28.080(2) and Meadowdale Neighborhood Committee v.
17 Edmonds, 27 Wn.App. 261 (1980) requiring service of process by
18 delivery of a copy of a summons to the mayor in order to acquire
19 jurisdiction over the city is not well placed. The appropriate
20 statute in this matter is RCW 90.48.120(2) which does not require
21 service of an order or directive on any specified city official. See
22 In re Saltis, 94 Wn.2d 889 (1980). Additionally, RCW 90.48.120(2)
23 does not require that a Notice of Violation precede an order or
24 directive.

25 2. Authority to impose condition S2. The discharge of any
26 pollutant by any person is unlawful unless in compliance with a NPDES

1 permit. 33 U.S.C. sections 1311, 1342. Under the Federal Water
2 Pollution Control Act, 33 U.S.C. section 1251 et seq (FWPCA), a permit
3 system is established requiring that any discharge of pollutants be
4 pursuant to a permit issued by the federal government or by an
5 EPA-approved state agency. Respondent has assumed the federal
6 permit-issuing role. RCW 90.48.260; WAC 173-220; 39 Fed. Reg. 26061
7 (1974). Pederson v. Department of Transportation, 25 Wn.App. 781
8 (1980).

9 Appellant's filter backwash is a "pollutant" being discharged
10 within the meaning of WAC 173-220-030(7) and 33 U.S.C. section
11 1362(6).¹ Therefore a NPDES permit is required for the discharge of
12 the silt. Pederson, supra.

13 Respondent has the authority to include a technology-based
14 effluent limitation in a NPDES permit (condition S2 herein) even
15 though the U.S. EPA has not promulgated an appropriate guideline. 40
16 CFR 125.3(a, c). WAC 173-220-130(1)(f). Reconsideration of the
17 substance of condition S2 is not now before us because of
18 jurisdictional limitations of the Board.²

19
20 1. The broad scope of "pollutant" is supported by the
21 all-encompassing meaning of "pollution:" "the manmade or man induced
22 alteration of the chemical, physical, biological and radiological
23 integrity of water." 33 U.S.C. section 1362 (19). See RCW
24 90.48.020. Appellant's system removes water from the river for sale
in a commercial sense. The silt from the filter is returned to the
river without the original volumes of water removed.

2. See Prehearing Order dated December 22, 1980. See Costle v.
Pacific Legal Foundation, 100 S.Ct. 1095, 1106-1108, (1980).

1 3. Existence of Permit WA-000376-0. Permits are valid for not
2 more than five years from the date of issuance. RCW 90.48.180. See
3 RCW 90.48.260. See FWPCA section 402(b)(1)(B). The statutory
4 provision finds expression in WAC 173-220-180. That regulation also
5 provides for application for "replacement to existing permits or
6 continuation of discharges after the expiration date" of a permit by
7 filing an application. The effect of such application is that the
8 existing permit does not expire until the application has been finally
9 determined. RCW 34.04.170(1); RCW 90.48.230; .260 and .262.³ By
10 making application for renewal of an existing permit or continuation
11 of discharges, appellant continues the existence of NPDES Permit
12 WA-000376-0⁴ and any order issued relative to that permit such as
13 Docket No. DE 80-255.

14 4. Arbitrary and Capricious Action. By agreement of the parties
15 at the prehearing conference, Docket No. DE 80-255 would be remanded
16 to DOE to modify the compliance period in the event that respondent
17 was found to have the necessary authority to include condition S2 in
18 the NPDES permit. Respondent has been determined to have such
19 authority. Accordingly the matter should be remanded to DOE for
20 further consideration and appellant's claim of arbitrary and
21 capricious action need not be considered on the merits or in a motion
22 to dismiss in light of the agreement to remand.

24 3. Appellant's reliance on RCW 90.48.200 is misplaced in light of
25 RCW 90.48.260 and .262 which override contrary provisions of ch. 90.48
RCW.

26 4. The federal law reaches a similar result. See 5 U.S.C.
27 section 558(c). See Costle v. Pacific Legal Foundation, 100
S.Ct. 1095 (1980), n. 10.

1 5. Order. Appellant's motion is denied and the matter is remanded
2 to respondent for further consideration.⁵

3 DATED this 6th day of March, 1981.

4 POLLUTION CONTROL HEARINGS BOARD

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6 
7 NAT W. WASHINGTON, Chairman

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9 
10 DAVID AKANA, Member

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19 5. As a practical matter, the new construction schedule could be
20 set forth in a new NPDES permit. At that time DOE may consider
21 matters other than the construction schedule, such as the continuing
22 necessity of condition S2.
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27 ORDER REMANDING & DENYING
APPELLANT'S MOTION TO DISMISS

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APPELLANT'S MOTION TO DISMISS -6-